Zubir bin Mustafa v Tenaga Nasional Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K–01–58 OF 1997
ABDUL KADIR SULAIMAN, ABDUL AZIZ MOHAMAD AND MOHD GHAZALI JJCA
18 JANUARY 2005

Land Law — Sale of land — Order for — Setting aside — Cause to contrary — Vesting of rights of chargor on first respondent not registered under the National Land Code 1965 — Whether first respondent had locus standi against — Registered chargee — Whether statutory vesting need to be registered before commencing proceedings for order for sale — National Land Code 1965 ss260 & 263

The appellant was an employee of the National Electricity Board ('the Board'). Whilst in the employment of the Board, the appellant bought a piece of land financed by a loan obtained from the Board. The land was charged to the Board as a security to the loan. Pursuant to the Electricity Supply (Successor Company) Act 1990 ('the Act') and the transfer order made thereunder, all properties, rights and liabilities of the Board were transferred to the first respondent. As the appellant defaulted in his repayment towards the said loan facility, the first respondent, through its solicitors demanded for the repayment of the amount outstanding under the loan. A notice pursuant to s 254 of the National Land Code 1965 ('NLC') was issued to the appellant. As no repayment was fothcoming, the first respondent applied for an order for sale under s 260 NLC from the Land Administrator ('the second respondent'). The second respondent granted the order for sale. The appellant then applied to the High Court for, *inter alia*, the said order to be set aside. The High Court dismissed the application and the appelant appealed to the Court of Appeal. The appellant raised the following arguments before the court: (a) that the High Court judge erred in deciding that the first respondent was not required to register the statutory vesting in order to commence proceedings for the order for sale under the NLC; (b) that for the first respondent to avail themselves of such remedy; it must be a registered chargee and as it had not registered the statutory vesting at the time the order for sale was applied for, it had no *locus standi* to commence any proceedings under the NLC; and (c) that although the Act vests all rights and liabilities of the Board to the first respondent, the latter must comply with NLC if it sought to obtain any remedy thereunder.

Held, dismissing the appeal:

(1) (per **Mohd Ghazali JCA**, **Abdul Kadir Sulaiman JCA** concurring) The observations of the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 equally apply to applications for order of sale made pursuant to s 263(1) of the NLC. The appellant had not shown any cause to the contrary within the contemplation of s 263(1) of the NLC. As such the second respondent was obliged to make the order for sale (see para 22).

(2) (per **Mohd Ghazali JCA, Abdul Kadir Sulaiman JCA** concurring) The fact that the first respondent had chosen not to register its interest in the said property pursuant to s 415 NLC was insufficient to defeat its right under the charge to apply for an order for sale. The second respondent had granted the order for sale upon the application of the first respondent and rightly so. In the exercise of his powers conferred by s 3(1) of the Act, the Minister ordered that all property, rights and liabilities to which the Board was entitled or subject to be transferred to the first respondent. The rights of the Board as chargee in relation to the said property had been transferred to the first respondent by virtue of the transfer date order and as from that date, the first respondent could enforce its rights as chargee including applying for an order for sale once there had been default on the part of the chargor, ie the appellant. The Act had clearly vested in the first respondent all rights under the charge. The first respondent may apply pursuant to s 415 of the NLC to register its goodself as chargee in place of the Board and the evidence showed it had done so. The appellant complained that the first respondent did so only after the order for sale was granted but then this was not fatal (see para 22).

(3) (per **Mohd Ghazali JCA, Abdul Kadir Sulaiman JCA** concurring) From the reading of the Act and the NLC, the registration of a statutory vesting was not a mandatory requirement. In the instant case, as it involves statutory vesting, the provisions of s 415 NLC would apply. That section did not make it mandatory for that transfer of rights under the charge from the Board to the first respondent to be registered. Further, there was no requirement of a fresh charge to be executed (see paras 22 and 23).

(4) (per **Abdul Aziz Mohamad JCA** dissenting) It was clear that for the purposes of the NLC, the first respondent, despite the statutory vesting, would not become the registered chargee of the land unless the statutory vesting was registered under s 415 NLC. Although the section was worded not in mandatory terms but the effect of the failure to register is that the first respondent would not be the registered chargee of the land for the purposes of the NLC. In that sense, registration of the statutory vesting was mandatory (see para 28).

(5) (per **Abdul Aziz Mohamad JCA** dissenting) The word 'chargee' in s260(2) must mean registered chargee and as the first respondent was not a registered chargee, they therefore had no *locus standi* (see para 33).

[**Bahasa Malaysia summary**

Perayu adalah seorang pekerja Lembaga Letrik Negara ('LLN'). Semasa dalam penggajian LLN, perayu membeli sebidang tanah yang dibiayai oleh pinjaman yang diperoleh dari LLN. Tanah tersebut digadaikan kepada LLN sebagai

jaminan kepada pinjaman tersebut. Berikutan dari Akta Bekalan Elektrik (Syarikat Pengganti) 1990 ('Akta tersebut') dan perintah pindahan yang dibuat di bawahnya, semua hartanah, hak-hak dan liabiliti LLN dipindahkan kepada responden pertama. Oleh kerana perayu telah ingkar membuat bayaran balik pinjaman tersebut, responden pertama, melalui peguamcaranya menuntut bayaran balik jumlah yang belum dibayar di bawah pinjaman tersebut. Satu notis di bawah s 254 Kanun Tanah Negara 1965 (KTN) telah dikeluarkan terhadap perayu. Oleh kerana tiada bayaran balik dibuat, responden pertama memohon untuk satu perintah untuk jualan di bawah s 260 KTN daripada Pentadbir Tanah ('responden kedua'). Responden kedua membenarkan perintah untuk jualan. Perayu kemudiannya memohon kepada Mahkamah Tinggi untuk, antara lain, perintah untuk jualan tersebut diketepikan. Mahkamah Tinggi menolak permohonan tersebut dan perayu merayu ke Mahkamah Rayuan. Perayu membangkitkan hujahannya berikut di hadapan mahkamah: (a) bahawa hakim Mahkamah Tinggi telah tersilap memutuskan bahawa responden pertama tidak diperlukan untuk mendaftarkan letakhak berkanun bagi memulakan prosiding untuk perintah untuk jualan di bawah KTN; (b) bahawa bagi responden pertama mendapat remedi tersebut, beliau hendaklah menjadi pemegang gadai yang berdaftar dan oleh kerana ia belum mendaftar letakhak berkanun tersebut pada masa permohonan untuk perintah untuk jualan dibuat, ia tidak mempunyai *locus standi* untuk memulakan sebarang prosiding di bawah KTN; dan (c) walaupun Akta tersebut telah meletakhak semua hak-hak dan liabiliti LLN kepada responden pertama, ia hendaklah mematuhi KTN jika ia ingin mendapat sebarang remedi di bawahnya.

Diputuskan, menolak rayuan itu:

(1) (oleh **Mohd Ghazali HMR**, **Abdul Kadir Sulaiman HMR** bersetuju) Pemerhatian Mahkamah Persekutuan di dalam *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 juga terpakai kepada permohonan untuk perintah untuk jualan yang dibuat di bawah s 263(1) KTN. Perayu tidak menunjukkan sebarang sebab bertentangan dalam erti kata s 263(1) KTN. Dari itu responden kedua terpaksa membuat perintah untuk jualan (lihat perenggan 22).

(2) (oleh **Mohd Ghazali HMR**, **Abdul Kadir Sulaiman HMR** bersetuju) Fakta bahawa responden pertama tidak mendaftarkan kepentingannya dalam tanah tersebut di bawah s 415 KTN adalah tidak mencukupi untuk mengalahkan haknya di bawah gadaian untuk memohon perintah untuk jualan. Responden kedua telah dengan betul memberikan perintah untuk jualan pada permohonan responden pertama. Dalam menggunapakai kuasa-kuasanya yang diberi oleh 3(1) Akta tersebut, Menteri telah mengarahkan semua hartanah, hak-hak dan liabiliti LLN dipindahkan kepada responden pertama. Hak-hak LLN sebagai pemegang gadai

berhubung dengan tanah tersebut telah dipindahkan kepada responden pertama oleh perintah pindahan dan dari tarikh tersebut, responden pertama boleh menguatkuasakan hak-haknya sebagai pemegang gadai termasuklah memohon untuk satu perintah untuk jualan apabila terdapat pengingkaran pada pihak penggadai, iaitu perayu. Akta tersebut dengan jelas telah meletakhak pada responden pertama semua hak-hak di bawah gadaian tersebut. Responden pertama boleh memohon di bawah s 415 KTN untuk mendaftarkan dirinya sebagai pemegang gadai menggantikan LLN dan keterangan telah menunjukkan yang demikian. Perayu mengatakan bahawa responden hanya berbuat demikian selepas perintah untuk jualan diberikan tetapi ini bukanlah satu yang fatal (lihat perenggan 22).

(3) (oleh **Mohd Ghazali HMR**, **Abdul Kadir Sulaiman HMR** bersetuju) Dari pembacaan Akta tersebut dan KTN, pendaftaran letakhak berkanun bukanlah satu keperluan yang mandatori. Dalam kes semasa, oleh kerana ia melibatkan letakhak berkanun, peruntukan-peruntukan s 415 KTN terpakai. Seksyen tersebut tidak membuatkannya mandatori bagi pemindahan hak-hak di bawah gadaian dari LLN kepada responden pertama didaftarkan. Selanjutnya, tiada keperluan untuk gadaian baru disempurnakan (lihat perenggan 22 dan 23).

(4) (oleh **Abdul Aziz Mohamad HMR** menentang) Ia jelas bahawa untuk tujuan KTN, responden pertama, walaupun dengan letakhak berkanun, tidak menjadi pemegang gadai berdaftar tanah tersebut melainkan jika letakhak berkanun tersebut didaftarkan di bawah s 415 KTN. Walaupun seksyen tersebut tidak menggunakan perkataan berbentuk mandatori namun kesan kegagalan mendaftar membuat responden pertama tidak menjadi pemegang gadai berdaftar tanah tersebut untuk tujuan KTN. Dalam maksud ini, pendaftaran letakhak berkanun adalah mandatori (lihat perenggan 28)

(5) (oleh **Abdul Aziz Mohamad HMR** menentang) Perkataan 'gadai' dalam s 260(2) mesti bererti pemegang gadai berdaftar dan oleh kerana responden pertama bukan seorang pemegang gadai berdaftar, ia dengan itu tidak mempunyai *locus standi* (lihat perenggan 33).]

Notes

For cases on order for sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3799–3892.

Cases referred to

Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77
Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd [1990] 3 MLJ 493

Legislation referred to

Electricity Act 1949 (Revised 1973)
Electricity Supply (Successor Company) Act 1990 s 3(1)
Electricity Supply Act 1990
National Land Code 1965 ss 5, 214(1), 254, 260, (2), 261, 263(1), 256(3), 414, 415, (1)(a), (2)

Appeal from: Originating Motion No 25–36 of 1996 (High Court, Alor Setar)

E Mayandi (Ahmad Farid with him) (Ahmad Farid & Associates) for the appellant.
Azham Ahmad (Azham, Halim & Nor Asiah) for the first respondent.
Aziah Ali (State Legal Advisor) for the second respondent.

Mohd Ghazali JCA (delivering majority judgment):

[1] The appellant was the registered owner of a piece of land held under PM No 360, Lot No 5196, Mukim Alor Malai, Daerah Kota Setar, Kedah ('the said property'). Prior to 18 May 1987 the appellant was an employee of the National Electricity Board ('the Board'). The Board was established under the Electricity Act 1949 (Revised 1973) which has since been repealed by the Electricity Supply Act 1990 (Act 447).

[2] Sometime in 1984, whilst being an employee of the Board, the appellant purchased the said property. On 4 September 1984 the appellant charged the said property to the Board upon obtaining from the Board a housing loan facility of RM138,113 carrying a 4% interest per annum on monthly rest ('the said facility'). On 18 May 1987 the appellant resigned from the Board. He however defaulted in his repayments towards the said facility.

[3] On 1 September 1990, the Electricity Supply (Successor Company) Act 1990 (Act 448) came into force ('the Act'). The Act was promulgated to provide for the following:

(i) the vesting of property, rights and liabilities of the Board in a company;

(ii) to make financial arrangements for that company;

(iii) to provide for matters relating to staff; and

(iv) for other matters connected therewith.

[4] Section 3 of the Act, entitled 'Vesting of property, etc, of the Board in the successor company' reads:

(1) The Minister may, by order published in the Gazefte, appoint a transfer date and on such date, all property, rights and liabilities to which the Board was entitled or subject to, immediately before that date shall become by virtue of this section property, rights and liabilities of the successor company.

(2) For the avoidance of doubt:

(a) any reference to property to which the Board was entitled to, is a reference to land and choses-in-action of the Board whether situated in Malaysia or elsewhere; and

(b) any reference to rights and liabilities to which the Board was entitled or subject to, is a reference to rights which the Board is entitled to or, as the case may be, liabilities to which the Board is subject to, whether under the laws of Malaysia or any country outside Malaysia and includes rights and liabilities arising under loans raised.

(3) Every chose-in-action transferred by sub-s (1) to the successor company may, after the transfer date, be sued on, recovered or enforced by the company in its own name and it shall not be necessary for the company or the Board to give notice to the person bound by the chose-in-action of the transfer effected by the subsection.

(4) Every right and liability transferred by sub-s (1) to the successor company may, on and after the transfer date, be sued on, recovered or enforced by or against the company in it own name and it shall not be necessary for the company or the Board to give notice to the person whose right or liability is transferred by this section of such transfer.

(5) In the case of rights and liabilities arising under any loans which vest in the company on the transfer date, the company may enter into such arrangements or agreements over such rights and liabilities with the Government of Malaysia or any third party.

[5] By virtue of a transfer date order dated 1 September 1990 made by the Minister pursuant to s 3(1) of the Act, all property, rights and liabilities to which the Board was entitled to or subject to, were transferred to the first respondent, viz, Tenaga Nasional Bhd, the successor company. The transfer date order reads:

Electricity Supply (Successor Company) Act 1990 Transfer Date Order 1990

In exercise of the powers conferred by s 3(1) of the Electricity Supply (Successor Company) Act 1990, the minister makes the following order:

1 This order may be cited as the Transfer Date Order 1990 and shall come into force of the 1 September 1990.

2 The transfer date on which all property, rights and liabilities to which the National Electricity Board of the States of Malaya was entitled or subject to, are transferred to Tenaga Nasional Bhd, is 1 September 1990.

Made 30 August 1990

(S)15/223/353/22/1–1: PM (Plh) 487

Dato' Seri S Samy Vellu

Minister of Energy, Telecommunications and Posts.

[6] By letter dated 12 March 1992, the first respondent's solicitors informed the appellant that as at 31 January 1992 the total amount outstanding under the said facility was RM233,397.77 and henceforth demanded payment of the said sum. By notice dated 20 April 1992 issued to the appellant, made pursuant to s 254 of the National Land Code ('the Code'), the first respondent demanded the said outstanding sum of RM233,397.77 from the appellant. Section 254 of the Code entitled 'Service of default notice, and effect thereof' reads:

(1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-s (1) of s 235 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D

(a) specifying the breach in question;

(b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

(2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be valid and effectual against that person or body as it was against the person or body on whom it was served.

(3) If at the expiry of the period specified in any such notice the breach in question has not been remedied:

(a) the whole sum secured by the charge shall (if it has not already done so) becomes due and payable to the chargee; and

(b) the chargee may apply for an order for sale in accordance with the following provisions of this chapter:

Provided that para (a) shall not apply to any charge to secure the payment of any annuity or other periodic sum.

[7] As no payment was forthcoming, on 5 June 1992, the first respondent applied for an order for sale from the second respondent pursuant to s 260 of the Code. Section 260 of the Code entitled 'Application to Land Administrator for order for sale' reads:

(1) This section applies to land held under:

(a) Land Office title;

(b) the form of qualified title corresponding to Land Office title; or

(c) subsidiary title,

and to the whole of any undivided share in, or any lease, of any such land.

(2) Any application for an order for sale under this Chapter by a charges of any such land or lease shall be made to the Land Administrator in Form 16G.

[8] On 27 January 1993 the second respondent granted the order for sale.

[9] On 6 August 1996 the appellant filed an originating summons and prayed for the following orders:

(i) that the order for sale dated 27 January 1993 be set aside;

(ii) that the public auction of the said property set down for 20 August 1996 be vacated;

(iii) alternatively, a declaration that the order for sale and the public auction is invalid and null and void;

(iv) any other order that the court deems fit; and

(v) costs.

[10] On 15 May 1997 the learned judge, High Court, Alor Setar dismissed the orders prayed for and against that decision, the appellant appealed to this court.

[11] Before the learned judge, the appellant's counsel argued:

(i) that the first respondent has no *locus standi* to apply for an order for sale under s 260 of the Code as the said property was charged to the Board and not to the first respondent;

(ii) that the Transfer Date Order did not automatically vest any right or entitlement under the charge to the first respondent to enable it to apply for an order for sale;

(iii) that the first respondent had not complied with the requirements as to registration of statutory vesting of its interest in the said property under s 415 of the Code when it applied for the order for sale;

(iv) that the first respondent had registered its interest in the said property only on 5 October 1996 whereas the order for sale was granted on 27 January 1993.

[12] Before us, the appellant canvassed the following arguments:

(a) that the learned judge erred in deciding that the first respondent was not required to register the statutory vesting in order to commence proceedings for the order for sale under the Code;

(b) that for the firstst respondent to avail themselves of such remedy; it must be a registered chargee; as it had not registered the statutory vesting at the time the order for sale was applied for, it had no *locus standi* to commence any proceedings under the Code;

(c) that although the Act vests all rights and liabilities of the Board to the first respondent, the latter must comply with the Code if it sought to obtain any remedy thereunder.

[13] What is statutory vesting? Section 414 of the Code provides as follows: **A**

'statutory vesting' means a vesting effected by any written law:

(a) of any registered interest in land or any registrable interest in land, whether or not under the provision effecting such vesting any instrument of transfer or any other instrument, whether specifically described or not, is required to be presented to the Registrar in order to give effect to such vesting; or **B**

(b) which has the effect of vesting in the transferee any other right or entitlement whatsoever in relation to any land which was the right or entitlement of the transferor, **C**

regardless of the words or expressions used in the written law in relation to such vesting, and regardless whether or not such words or expressions include the word 'vesting' or 'transfer';

[14] Section 415 of the Code entitled 'Application for registration of a statutory vesting of a registered or registrable interest in land' reads: **D**

(1) A transferee, or a person lawfully entitled to do so on his behalf, may apply to the Registrar:

(a) in Form 30A for statutory vesting of a registered interest in land held by the transferor to be registered in the name of the transferee; or **E**

(b) in Form 30B for a statutory vesting of a registrable interest in land held by the transferor to be registered in the name of the transferee.

(2) Where the Registrar is satisfied that the registered interest in land in respect of which the application under para (a) of sub-s (1) is made has been vested in the transferee under the written law specified in the application, the Registrar shall, upon the presentation of the application: **F**

(a) …;

(b) in any other case:

(i) make a memorial on the register document of title to the effect that the registered interest in land to which the application relates has been vested in the transferee; and **G**

(ii) after making a memorial to the same effect on the issue document of title, transmit the issue document of title to the transferee.

(3) Where the Registrar is satisfied that the registrable interest in land in respect of which the application under para (b) of sub-s (1) is made has been vested in the transferee under the written law specified in the application, the Registrar shall, upon the presentation of the application register the said registrable interest in land in the name of the transferee. **H**

(4) The registration of the registered interest in land or the registrable interest in land, as the case may be, in the name of the transferee shall be effected under sub-s (2) or (3), notwithstanding anything inconsistent therewith, or contrary thereto, contained in Part Fourteen. **I**

[15] The learned judge was of the view that s 415 of the Code is not a mandatory provision. In relation to this, he referred to *'Tenure and Land Dealings in the Malay States*' by David SY Wong where the learned writer said (at p 314):

> (f) Statutory Vesting:
>
> The Code also contains provisions relating to statutory vesting of land or an interest in land in a public authority to the effect that where the operative written law does not provide for the vesting to be registered or provides that 'no instrument of transfer or other instrument shall be required to be presented to the Registrar in order to give effect to the vesting1 the public authority 'may apply' for the vesting to be registered under these provisions in the manner thereby prescribed.

[16] The learned judge was of the view that it is clear that the rights or interest of the Board have been vested in the first respondent by the Act and this became effective when the Transfer Date Order was made by the Minister. That being the position, he found that the first respondent has the *locus standi* to apply for the order for sale notwithstanding there was no registration of the statutory vesting under the Code in relation to the charge of the said property and as such dismissed the appellant's originating summons with costs.

[17] Section 5 of the Code provides a 'charge' means 'a registered charge'. Section 214(1) of the Code provides, *inter alia*, any charge shall be capable of transfer under the Code. In the instant case, the said property was charged to the Board as a consequence of the granting of the said facility. Thus, it cannot be disputed that the charge is not a registered charge. It is also not disputed that the appellant defaulted in making repayments. Pursuant to s 260 of the Code the first respondent, as chargee of the said property in place of the Board, having taken that position and rightly so as from 1 September 1990 all property, rights and liabilities which the Board was entitled to or subject to have been transferred to its goodself by virtue of the Transfer Date Order, applied to the second respondent for an order for sale of the said property. Section 261 of the Code provides upon receiving such an application, the land administrator, ie the second respondent shall hold an enquiry. Section 263(1) of the Code reads:

> At the conclusion of any enquiry under section 261, the Land Administrator shall order the sale of the land or lease to which the charge in question relates unless he is *satisfied of the existence of cause to the contrary*. (Emphasis added.)

[18] On 27 January 1993 the second respondent granted the order for sale of the said property. The appellant filed this originating summons and claimed for, inter alia, an order that the order for sale dated 27 January 1993 be set aside or alternatively the order for sale is invalid and null and void. The arguments canvassed by the appellant have been discussed above.

[19] Section 256(3) of the Code, which is couched in the same words as s263(1) and which applies to Registry titles in application to court for order for sale reads:

> On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

[20] As to what is meant by the words 'cause to the contrary' was dealt with by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. Gopal Sri Ram JCA, in delivering the judgment of the court said (at pp 82–83):

> The critical phrase in sub-s (3) of s 256 to which we have lent emphasis, despite having been the subject of judicial pronouncements, continues to demand the attention of courts. There is no doubt that, upon a plain reading of the subsection, a High Court is entitled to refuse an order for sale of charged property once it is satisfied of the existence of cause to the contrary. But the question then arises: what is meant by 'cause to the contrary'?
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> In our judgment, 'cause to the contrary' within s 256(3) may be established only in three categories of cases.
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> First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the Code establishes cause to the contrary. That section provides as follows:
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> > 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
> >
> > (2) The title or interest of any such person or body shall not be indefeasible:
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> > (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> > (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> > (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
> >
> > (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):
> >
> > (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
> >
> > (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
> >
> > Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-ss(2) and (4)(b) above will be held to have established cause to the contrary under s 256(3).

Secondly, a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee.

Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity.

[21] His Lordship continued at pp 87–88 as follows:

As earlier observed, unless a chargor can bring himself within one of the three categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court will be obliged to make an order for sale…

[22] We are of the view that the observations of the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* equally apply to applications for order of sale made pursuant to s 263(1) of the Code. The appellant in the instant case has applied for the order for sale to be set aside but he has not shown any cause to the contrary within the contemplation of s 263(1) of the Code. Assuch we are of the view that under the circumstances the second respondent was obliged to make the order for sale. The fact that the first respondent has chosen not to register its interest in the said property pursuant to s 415 of the Code was insufficient to defeat its right under the charge to apply for an order for sale. The second respondent has granted the order for sale upon the application of the first respondent and rightly so. In the exercise of his powers conferred by s 3(1) of the Act, the Minister ordered that all property, rights and liabilities to which the Board was entitled or subject to be transferred to the first respondent. The rights of the Board as chargee in relation to the said property has been transferred to the first respondent by virtue of the Transfer Date Order and as from 1 September 1990, the first respondent can enforce its rights as chargee including applying for an order for sale once there has been default on the part of the chargor, ie the appellant. The Act has clearly vested in the first respondent all rights under the charge. The first respondent may apply pursuant to s 415 of the Code to register its goodself as chargee in place

of the Board and the evidence showed it has done so on 5 October 1996. The appellant complained that the first respondent did so only after the order for sale was granted but then we cannot see how that can be fatal. From our reading of the Act and the Code, we would agree with the learned judge that registration of a statutory vesting is not a mandatory requirement. In *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94, which was cited by learned counsel for the second respondent, Gopal Sri Ram JCA in delivering the judgment of the Federal Court said (at pp 100–101):

> The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases.

[23] Section 414 of the Code defines statutory vesting. It is a vesting effected by any written law and such vesting takes effect irrespective of whether or not any instrument of transfer or other instrument is required to be presented to the Registrar in order to give effect to such vesting, or which has the effect of vesting in the transferee any other right or entitlement whatsoever in relation to any land which was the right or entitlement of the transferor. All rights of the Board under the charge were automatically transferred to the first respondent with effect from 1 September 1990. Such rights include the rights of the Board as a registered chargee. By operation of law, on 1 September 1990 the first respondent became the registered chargee in place of the Board. As the first respondent has been vested with the rights as a registered chargee, we cannot see how it can be argued that the first respondent did not have the *locus standi* when it made the application for order for sale. The rights of the Board under the charge has been transferred to the first respondent. The Board is no longer the chargeeand the first respondent has stepped into its shoes by virtue of the Act and the Transfer Date Order. The charge over the said property remains a registered charge. There was no fresh charge to be executed. This was not the case in *Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd* [1990] 3 MLJ 493, referred to by learned counsel for the appellant in his submission. In that case, the plaintiff, a bank had stepped into the shoes of another bank, viz, Citibank NA after it had paid off the latter the full sum owed by the defendants which was secured by a charge. The defendants then went on to execute a fresh charge in favour of the plaintiff which could not be registered. The plaintiff later applied for an order for sale. The application was founded on the plaintiff's claim to be subrogated to the rights of Citibank NA, the registered chargee of the property. The plaintiff's application was dismissed on the grounds that the charge has to be registered before it can enforce its right of foreclosure under the Code. The facts there were clearly different. Furthermore, it was not a case of statutory vesting. In the instant case, it involves statutory vesting and hence the provisions of s 415 of the Code would apply. That section does not make it mandatory for that transfer of rights under the

charge from the Board to the 1st respondent to be registered. Further, there is no requirement of a fresh charge to be executed.

[24] For these reasons, we would dismiss this appeal with costs and order that the deposit be paid to the first and second respondents towards the account of taxed costs.

[25] My learned brother, Abdul Kadir Sulaiman JCA had read the draft and had expressed his agreement thereto. Dated this 18 January 2005.

Abdul Aziz Mohamad JCA (delivering dissenting judgment):

[26] The facts of this case, and the statutory provisions that have a bearing on the case, have been set out by my learned brother, Mohd Ghazali Mohd Yusoff JCA. So I shall not set them out in extenso.

[27] The National Electricity Board ('NEB') were at all material times the registered chargee of the appellant's land. As registered chargee, they had a registered interest in the land. S 414 of the National Land Code ('the Code') defines 'registered interest in land' as 'any land or any interest in land … registered in the name of the transferor, and in respect of which a transfer is capable of being effected under Part Fourteen'. There is no dispute that the NEB's registered interest in the land as chargee had, on 1 September 1990, by virtue of sub-s (1) of s 3 of the Electricity Supply (Successor Company) Act 1990 (Act 448) and the Transfer Date Order 1990 made under that subsection, become the interest of the Tenaga Nasional Berhad ('TNB'), the first respondents. On that date the TNB were vested with the NEB's registered interest in the land as chargee. It is not disputed that there was, therefore, a 'statutory vesting' of that interest in the TNB by virtue of para (a) of the definition of that term in s 414 of the Code, with the NEB as 'transferor' and the TNB as 'transferee'. Section 414 of the Code defines 'transferor' as 'the person from whom a statutory vesting is effected in favour of a transferee', and 'transferee' as 'the person in whose favour a statutory vesting is effected'. Section 415(1)(a) enabled the TNB as transferee to apply for the statutory vesting to be registered. The application would be 'for a statutory vesting of a registered interest in land held by the transferor to be registered in the name of the transferee'. If the TNB had applied, the Registrar, according to sub-s (2) of s 415, would first have to be satisfied that the NEB's registered interest had been vested in the TNB under Act 448. Then he would, under para (b), 'make a memorial on the register document of title to the effect that the (NEB's registered interest in the land) has been vested in the (TNB)', and make a memorial to the same effect on the issue document of title.

[28] It is, therefore, clear that for the purposes of the Code the TNB, despite the statutory vesting, would not become the registered chargee of the land unless the statutory vesting is registered under s 415. Although the section is

worded not in mandatory terms but in enabling terms, the effect of failure to register is that TNB would not be the registered chargee of the land for the purposes of the Code. In that sense, registration of the statutory vesting is mandatory.

[29] The TNB had not applied for registration of the statutory vesting when they applied for the order for sale of the land and obtained it on 27January 1993. They were therefore not the registered chargee of the land for the purposes of the Code. The question in this appeal is whether they had *locus standi* to apply for the order for sale. If they did not have it, the order for sale ought not to have been made by the Land Administrator, the second respondent, and should have been set aside by the learned judge. Absence of *locus standi* would be 'the existence of cause to the contrary' for the purposes of s 263(1) of the Code. It would come within the second category of causes to the contrary laid down by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 at p 83, namely, failure of the chargee 'to meet the conditions precedent for the making of an application for an order for sale'. Although the Federal Court spoke of failure as specifically that of the chargee, I would take the statement as also speaking alternatively of failure of the applicant. One of the conditions precedent is that, as is plain from s 260(2), the application must be one 'by a chargee'. If the TNB were not the 'chargee' when they applied for the order for sale, the condition precedent for making the application was not met.

[30] It is the appellant's case that the TNB had no *locus standi* to apply for the order for sale because they were not the registered chargee of the land. His counsel argued that since 'charge' is defined in s 5 of the Code as 'a registered charge', it follows that 'chargor' and 'chargee' in the Code, including 'chargee' in s 260(2), must mean registered chargor and registered chargee. Since the TNB were not a registered chargee, they were not qualified to apply under s260(2). The appellant's counsel also cited *Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd* [1990] 3 MLJ 493 to support his submission that 'chargee' in the Code means registered chargee. Although the case differs from the present in the facts and did not involve statutory vesting, of relevance to the submission of the appellant's counsel are the statements of Mohamed Dzaiddin J (as he then was) at pp 495 B–C, E–F (right) that '(the Code) adheres strictly to the principle of registration and recognizes only parties who are registered under the Code' and that 'the Code recognises only registered chargees'.

[31] The TNB's counsel in his oral submission in this appeal merely argued that the registration of a statutory vesting under s 415 of the Code is not mandatory and that the *Oriental Bank* case concerned a different situation from that in the present case. In view of what I have said about the effect of the TNB's failure to register the statutory vesting and about the case, the argument is insufficient to meet the appellant's argument.

[32] The learned state legal adviser, who represented the land administrator, seems by her written submission to accept that for the TNB to have the *locus standi* to apply for an order for sale they must be the registered chargee. The thrust of her argument is delivered in these words in para 12 of her written submission: 'By operation of law on (1 September 1990) the (TNB) became the registered chargee in place of NEB'. As I said, in my opinion the TNB were not a registered chargee when they applied for and obtained the order for sale because the statutory vesting in their favour had not been registered under s 415 of the Code.

[33] I would decide this appeal on the basis that the respondents have failed to overcome the appellant's argument which, in any case, I find sound in law. The word 'chargee' in s 260(2) must mean registered chargee and the TNB were not a registered chargee. They therefore had no *locus standi*. The respondents have not attempted to assert, or presented grounds for asserting, that even though the TNB were not the registered chargee they were still qualified to apply for an order for sale. I would therefore allow the appeal and order that the order for sale be set aside.

Appeal allowed.

Reported by Izzaty Izzuddin